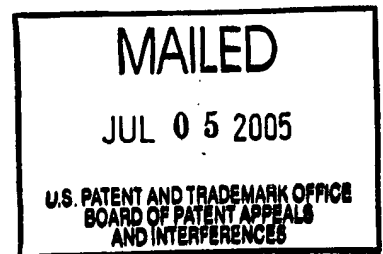# UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

<u>Ex parte</u> ROBERT WALTER DMITROCA

Appeal No. 2005-0174
Application No. 09/456,603

ON BRIEF

MAILED
JUL 0 5 2005
U.S. PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES

Before BARRETT, RUGGIERO, and DIXON, <u>Administrative Patent Judges</u>.

RUGGIERO, <u>Administrative Patent Judge</u>.

DECISION ON APPEAL

This is a decision on the appeal from the Examiner's rejection of claims 1-7 and 12-17. Claims 8-11 and 18-20 have been indicated to be allowable subject to being rewritten in independent form. An amendment filed concurrently with the Supplemental Appeal Brief has been approved for entry by the Examiner.

The claimed invention relates to an adaptive bin sizing technique for the management of packet delay values incurred by a network during the transmission of data packets. A plurality of

bins are utilized for maintaining the number of times that delay

values fall within the range of a particular bin. Each delay

value causes a particular element of a bin array to be

incremented dependent on the particular delay value. If a

particular delay value is larger than the range of the largest

ranged bin, the range of the bins is adjusted so that the values

of the original bin array are compressed into new ranges.

Claim 1 is illustrative of the invention and reads as

follows:

1. A method for managing performance data about a network
for graphical display, wherein the performance data is in the
form of data values, wherein method uses a plurality of bins for
maintaining a count of instances that data values are within a
current range, wherein each bin maintains a number of instances
that data values are within a particular portion of the current
range, wherein each portion has an equal size, and wherein the
method further uses an array for maintaining performance data
values that are not within the current range, the method
comprising the steps of:
    receiving a data value;
    determining whether the data value is within the current
range;
    incrementing the number of a particular bin of the plurality
of bins, if the data value is within the current range, wherein
the particular bin is selected based on the data value;
    storing the data value in the array, if the data value is
not within the current range; and
    scaling the current range and the size of the portions, if
the data value is not within the current range.

The Examiner relies on the following prior art:

Baker et al. (Baker)   5,226,118   Jul. 06, 1993
Siu et al. (Siu)   5,883,924   Mar. 16, 1999
Fletcher et al. (Fletcher)   6,321,264   Nov. 20, 2001
                                        (filed Aug. 28, 1998)

Claims 1-4 and 12-14 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Baker. Claims 5-7 and 15-17 stand rejected under 35 U.S.C. § 103(a). As evidence of obviousness, the Examiner offers Baker in view of Fletcher with respect to claims 5, 7, 15, and 17, and Baker in view of Siu with respect to claims 6 and 16.

Rather than reiterate the arguments of Appellant and the Examiner, reference is made to the Briefs[1] and Answer for the respective details.

OPINION

We have carefully considered the subject matter on appeal, the rejections advanced by the Examiner, and the evidence of anticipation and obviousness relied upon by the Examiner as

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[1] The Appeal Brief (supplemental) was filed December 18, 2003 (Paper no. 14). In response to the Examiner's Answer mailed February 23, 2004 (Paper No. 15), a Reply Brief was filed April 22, 2004 (Paper No. 17), which was acknowledged and entered by the Examiner as indicated in the communication dated July 27, 2004 (Paper No. 18).

support for the rejections. We have, likewise, reviewed and taken into consideration, in reaching our decision, Appellant's arguments set forth in the Briefs along with the Examiner's rationale in support of the rejections and arguments in rebuttal set forth in the Examiner's Answer.

It is our view, after consideration of the record before us, that the Baker reference does not fully meet the invention as set forth in claims 1-4 and 12-14. With respect to the Examiner's 35 U.S.C. § 103(a) rejection, we are also of the view that the evidence relied upon and the level of skill in the particular art would not have suggested to one of ordinary skill in the art the obviousness of the invention as recited in claims 5-7 and 15-17. Accordingly, we reverse.

We consider first the rejection of claims 1-4 and 12-14 under 35 U.S.C. § 102(e) as being anticipated by Baker. Anticipation is established only when a single prior art reference discloses, expressly or under the principles of indecency, each and every element of a claimed invention as well as disclosing structure which is capable of performing the recited functional limitations. <u>RCA Corp. v. Applied Digital Data Systems, Inc.</u>, 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed.

Cir.); <u>cert. dismissed</u>, 468 U.S. 1228 (1984); <u>W.L. Gore and</u>
<u>Associates, Inc. v. Garlock, Inc.</u>, 721 F.2d 1540, 1554, 220 USPQ
303, 313 (Fed. Cir. 1983), <u>cert. denied</u>, 469 U.S. 851 (1984).

With respect to the appealed independent claims 1 and 12, the Examiner attempts to read the various limitations on the disclosure of Baker. In particular, the Examiner directs attention (Answer, page 5) to the illustrations in Figures 21 and 22 of Baker, as well as various passages from columns 5-8, 11, 12, and 14 of Baker.

Appellant's arguments in response assert a failure of Baker to disclose every limitation in independent claims 1 and 12 as is required to support a rejection based on anticipation. Appellant's assertions (Brief, pages 6-8; Reply Brief, pages 2-5) focus on the contention that, in contrast to the claimed invention, Baker does not disclose the scaling of the current range and size of the bin portions of a graphical display if a performance data value is not within the current range.

After reviewing the Baker reference in light of the arguments of record, we are in general agreement with Appellant's position as expressed in the Briefs. We agree with Appellant that, at best, Baker merely discloses the expansion of a 'data

analysis chart display so that either all data will be shown on the display or, upon the movement of an expansion selection element, a zoom operation will be performed to display a selected one or a number of data points.

We further agree with Appellant (Brief, page 7) that, although the Examiner suggests that the claimed scaling feature is "inherent in displaying any GUI display of a graph" (Answer, page 8), any suggestion of inherency with regard to the existence of the claimed display scaling features in Baker is simply not supported by any disclosure in the Baker reference. To establish inherency, evidence must make clear that the missing descriptive matter is necessarily present in the thing described in the reference and would be recognized as such by persons of ordinary skill. In re Robertson, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999) citing Continental Can Co. v. Monsanto Co., 948 F.2d 1264, 1268, 20 USPQ2d 1746, 1749 (Fed. Cir. 1991). "Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient." Id. citing Continental, 948 F.2d at 1269, 20 USPQ2d at 1749.

In view of the above discussion, since all of the claim limitations are not present in the disclosure of Baker, we do not sustain the Examiner's 35 U.S.C. § 102(e) rejection of independent claims 1 and 12, nor of claims 2-4, 13, and 14 dependent thereon.

Turning to a consideration of the Examiner's 35 U.S.C. § 103(a) rejections of dependent claims 5, 7, 15, and 17, based on the combination of Baker and Fletcher, and of dependent claims 6 and 16, based on the combination of Baker and Siu, we do not sustain these rejection as well. The Fletcher reference has been added to Baker by the Examiner to address the packet delay time features of claims 5, 7, 15, and 17, while Siu has been added to Baker to address the jitter determination feature of claims 6 and 16. We find nothing, however, in the disclosures of Fletcher or Siu, taken individually or collectively, which would overcome the innate deficiencies of Baker discussed supra.

In summary, we have not sustained any of the Examiner's rejections of the claims on appeal. Therefore, the decision of the Examiner rejecting claims 1-7 and 12-17 is reversed.

REVERSED

LEE E. BARRETT   )
Administrative Patent Judge   )
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) BOARD OF PATENT
JOSEPH F. RUGGIERO   )   APPEALS
Administrative Patent Judge   )   AND
) INTERFERENCES
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JOSEPH L. DIXON   )
Administrative Patent Judge   )

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